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7 **UNITED STATES BANKRUPTCY COURT**  
8 **DISTRICT OF NEVADA**

9  
10 In re: ) BK-S-09-28339-LBR  
          ) Chapter 13  
11 CAROLYN J. JOHNSON and )  
MICHAEL JOHNSON, ) Hearing Date: January 14, 2010  
12 ) Hearing Time: 2:30 p.m.  
13 Debtors. ) Trustee: Kathleen Leavitt  
14 )

15 **MOTION FOR ORDERS DETERMINING VALUE OF REAL PROPERTY, EXTENT OF**  
16 **SECURED CLAIMS AND EXTINGUISHING THE LIEN OF WELLS FARGO BANK**

17 The Debtors, Carolyn J. Johnson and Michael Johnson, (hereinafter "Debtors"), by and through  
18 counsel, Marjorie A. Guymon, Esq. of Goldsmith & Guymon, P.C., hereby move the Court for the  
19 following relief:

- 20 1. An Order determining that the value of that certain real property commonly known as 9803  
21 Antelope Canyon Avenue, Las Vegas NV 89147 was \$257,000.00 as of the date of filing;
- 22 2. Determining that the secured claim of Wells Fargo Bank (hereinafter "Wells Fargo 1")  
23 with respect to the Real Property is senior to that of Wells Fargo Bank (hereinafter "Wells Fargo 2") and  
24 that the amount of Wells Fargo 1's secured claim exceeds the value of the Real Property;
- 25 3. Determining that Wells Fargo 2's claim is wholly unsecured; and
- 26 4. Finding that modification of Wells Fargo 2's claim is therefore appropriate under 11 U.S.C.  
27 §1322(b)(2), that the lien of Wells Fargo 2 is extinguished and that Wells Fargo 2 may be provided for

1 as an unsecured claim in the Debtors' Chapter 13 plan.

2 DATED: December 9, 2009.

3 GOLDSMITH & GUYMON, P.C.

4  
5 By: 

6 Marjorie A. Guymon, Esq.  
7 Nevada Bar No. 4983  
8 2055 Village Center Circle  
9 Las Vegas, Nevada 89134  
10 Attorney for Debtors

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I.**

13 **BACKGROUND FACTS**

14 Debtors filed for bankruptcy protection on September 30, 2009 under Chapter 7. On  
15 December 4, 2009, Debtors converted to Chapter 13. Debtors owned and resided at Real Property.  
16 According to full appraisal report, the Real Property had a value of \$257,000.00. On the date of  
17 filing, the first deed of trust encumbered the Real Property in favor of Wells Fargo 1 which had a  
18 balance of \$319,641.00. A second deed of trust encumbered the Real Property in favor of Wells  
19 Fargo 2 which had a balance of \$63,015.00.

20 **II.**

21 **AUTHORITIES**

22 **AN APPRAISAL SHOWS THAT THE VALUE OF THE REAL PROPERTY WAS**  
23 **\$257,000.00 AS OF THE FILING DATE.**

24 Pursuant to Rule 3012 of the Federal Rules of Bankruptcy Procedure (hereinafter "FRBP"),  
25 "[t]he court may determine the value of a claim secured by a lien on property in which the estate has  
26 an interest, on motion of any party in interest and after a hearing on notice to the holder of the  
27 secured claim and any other entity as the court may direct ..."

28 In this case, Debtors have provided the Court with a full appraisal of the Real Property  
showing a market value of \$257,000.00. The appraisal was completed on November 25, 2009,

1 before the conversion of this case, and was prepared by a disinterested, duly qualified expert within  
2 the meaning of Fed. R. Evid. 702. A copy of the appraisal is attached hereto as Exhibit A and  
3 incorporated herein by reference. Accordingly, Debtors request that the Court determine the value of  
4 the Real Property to be \$257,000.00

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6 **III.**

7 **GIVEN THE VALUE OF THE REAL PROPERTY, THE FIRST DEED OF TRUST IS**  
8 **UNDERSECURED AND THE SECOND DEED OF TRUST IS WHOLLY**  
9 **UNSECURED.**

10 FRBP 3012 implements Section 506(a) of the Bankruptcy Code with respect to valuation of a  
11 secured claim in order to determine the extent to which it is secured and the extent to which it is  
12 unsecured. Section 506(a) provides:

13 "[a]n allowed claim of a creditor secured by a lien on property in which the estate has  
14 an interest... is a secured claim to the extent of the value of such creditor's interest in  
15 the estate's interest in such property,... and is an unsecured claim to the extent that  
16 the value of such creditor's interest ... is less than the amount of such allowed claim."

17 Additionally, section 506(d) states that, "[t]o the extent that a lien secures a claim against the  
18 debtor that it is not an allowed secured claim, such lien is void."

19 Section 506 is a section of general applicability and a Chapter 13 case allows bifurcation of a  
20 claim into secured and unsecured portions. Wilson v. Commonwealth Mortgage Corp., 895 F.2d  
21 123, 22 C.B.C. 561 (3<sup>rd</sup> Cir. 1990).

22 **IV.**

23 **AS A WHOLLY UNSECURED LIENHOLDER, RESPONDENT'S RIGHTS MAY BE**  
24 **MODIFIED UNDER 11 U.S.C. §1322(B)(2) AND IT MAY BE TREATED AS AN**  
25 **UNSECURED CREDITOR.**

26 Many courts, even prior to the passage of the BAPCPA of 2005, had already held that  
27 Nobleman v. American Savings Bank, 13 S.Ct. 2106 (1993) was inapplicable when senior liens were  
28 in excess of the fair market value of the property. Therefore, the instant case would fall outside the  
protection otherwise afforded by Nobleman, because claimant's lien is wholly unsecured.

The passage of the Bankruptcy Reform Act of 1994 did not change the ability of lien stripping  
of a wholly unsecured creditor. It merely provided that a loan which fully matured prior to the filing

1 of the Chapter 13 petition, or a loan which matures during the life of the plan, may be paid through  
2 the plan. 11 U.S.C. §1322(b)(2).

3 Under Nobleman, a lien cannot be stripped if any portion of the interest was secured. Thus, by  
4 implication, when a lien is wholly unsecured, it can be stripped. Courts have consistently  
5 distinguished between Nobleman and facts involving a wholly unsecured lien holder. In fact, most  
6 reported decisions have rejected the proposition that Nobleman prohibits modification of a totally  
7 unsecured lien on a chapter 13 debtor's principal residence. These Courts, along with the 9<sup>th</sup> Circuit  
8 Bankruptcy Appellate Panel, interpret Nobleman to require the existence of an allowable secured  
9 claim as the predicate for the protection form modification in 11 U.S.C. §1322(b)(2).

10 In the 9<sup>th</sup> Circuit Bankruptcy Appellate Panel Case, In re Lam, the Court held that:

11 "The Nobleman decision holding that section 1322(b) bars a chapter 13 plan from modifying  
12 the rights of holders of claims, secured only by the debtor's principal residence, does not  
13 apply to holders of totally unsecured claims. The extension of the protections of section  
14 1322(b) to wholly unsecured lien holders is contrary to the provisions of the bankruptcy code  
15 allowing dischargeability of unsecured claims."

16 In In re Lam, 121 B.R. 36, 41 (9<sup>th</sup> Cir. B.A.P. 1997), the Court concurred with the holding of  
17 several cases that permitted modification of secured creditor's claims that were wholly unsecured.  
18 Id., at 41.

19 Yet another California case has a similar holding to In re Lam. The Court in In re Geyser  
20 sustained a debtor's motion to avoid a lien brought under Bankruptcy Code Section 506(d) and held  
21 that a Chapter 13 debtor may strip off a lien on his or her primary residence when the lien holder's  
22 interest is totally unsecured, stating that:

23 [T]he term 'secured claim' as used in section 1322(b)(2) has the same meaning as the term  
24 "secured claim" in section 506(a). Unless there is some equity to which the creditor's lien  
25 attaches, there is no allowed secured claim and no entitlement to the protection against  
26 modification contained in section 1322(b)(2). A chapter 13 debtor may 'strip-off' a lien on  
27 his or her primary residence under the plan or under section 506(d) when the lien holder's  
28 interest is totally unsecured.

In re Geyser, 203 B.R. 726, 729 (S.D. Cal. 1996).

1 The Court's ruling in the case at bar should be unaffected by the landmark Supreme Court case  
2 in Nobleman. In Nobleman, Justice Thomas held that Code Section 1322 (b)(2) prohibits splitting  
3 an undersecured home mortgage holder's claim into its secured and unsecured portions for purposes  
4 of confirmation of a Chapter 13 Plan. Nobleman, 13 S.Ct. 2106. Unlike the case at bar, in  
5 Nobleman, the lien to be stripped was the holder of the first deed of trust for \$71,335.00, and the  
6 debtor's principal residence was worth \$23,500.00. Thus, the bank's claim was at least partially  
7 secured by the debtor's home.

8 Here, Wells Fargo 2's lien is not the first but the second deed of trust. Further, there can be no  
9 reasonable contention that any part of the second deed of trust is secured. Thus, the facts, reasoning  
10 and holding of Nobleman are inapplicable to this case.

11 In this case, the Real Property is Debtors' principal residence which has a market value of  
12 \$257,000.00. Wells Fargo 1 had a balance of \$319,641.00. Thus, Wells Fargo 2's secured interest in  
13 the Real Property is zero because there is absolutely no equity to which its lien could attach.

14 Because Wells Fargo 2 possesses a totally unsecured claim on Debtors' residence and it does  
15 not have an allowable secured claim, Wells Fargo 2 cannot seek protection from modification under  
16 11 U.S.C. §1322 (b)(2) and Debtors may modify the claim and avoid claimant's lien. Therefore,  
17 Wells Fargo 2's second deed of trust should be extinguished, reconveyed, and treated as unsecured  
18 for purposes of this Chapter 13 proceeding.

19 V.

20 **IN RE DEWSNUP IS DISTINGUISHED FROM THE LIEN STRIPPING**  
21 **REQUESTED IN THIS CHAPTER 13 CASE.**

22 The Chapter 7 case Dewsnup v. Tim, 502 U.S. 410, 112 S. Ct. 773, 116 L.Ed.2d 903 (1992)  
23 has no application to this Chapter 13 case. The relevant cases are those Chapter 13 cases cited by  
24 Debtors above which turn on interpretations of §1322(b)(2). Those interpretations conclude that a  
25 Chapter 13 plan may modify the rights of claim holders, other those **secured** only by a security  
26 interest in real property that is the Debtors' principal residence. Section 1322(b)(2), in light of  
27  
28

1 §506(a), does not preclude modification by a Chapter 13 Plan of the rights of holders of unsecured  
2 claims even those of holders of deeds of trust which are completely unsecured.

3 To this end, Justice Scalia, in his dissent in Dewsnup, pointed out the difference between lien  
4 stripping in a Chapter 7 case and lien stripping in a Chapter 13 case when he stated that,

5 “Respondents assume, for example, that a debtor in a Chapter 13 cannot strip down a  
6 mortgage placed on the debtor’s home; but that assumption may beg the very  
7 question the Court answers today. True, Section 1322 (b)(2) provides that Chapter 13  
8 filers may not “modify the rights of secured claims”, that are “secured only by a  
9 security interest in real property that is the debtor’s principal residence. But this can  
10 be and has been read, in light of Section 506(a), to prohibit modification of the  
11 mortgagee’s rights only with respect to the operation of his claim that is deemed  
12 secured under the Code. See, e.g., In re Hart 923 F.2d 1410, 1415 (CA 10 1991);  
13 Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123, 127 CA3 1990).”

14 Dewsnup, 502 U.S. 410, 428, 112 S. Ct. 773, 784.

15 In Denver v. Internal Revenue Service, 164 B.R. 132 (C.D. Cal. 1994), the Court held that in  
16 spite of Dewsnup, stripping an IRS lien on a principal residence is permissible in a Chapter 11 case.  
17 The Court noted that while under Dewsnup, Chapter 7 debtors cannot use §506 to strip liens on an  
18 undersecured claim, the Supreme Court specifically reserved the question as to the applicability of its  
19 ruling in Dewsnup to cases under the reorganization chapters. Id., at 133. The Denver Court  
20 discussed the issue of lien stripping in Chapter 13 cases and cited the 10<sup>th</sup> Circuit case of In re Hart  
21 wherein the Court reasoned:

22 The dispositive issue in this case is whether Eastland’s undersecured loan may be  
23 bifurcated into two claims by applying general principals of Section 506(a) to the  
24 mortgage and then protecting only the secured claim by provisions of Section  
25 1322(b). We believe it can.

26 In re Hart, 923 F.2d 1410, 1413 (10<sup>th</sup> Cir. 1991).

27 After citing In re Hart, in Denver the Court went on to state:

28 “If Section 506 does not permit debtors to bifurcate undersecured claims and strip  
down liens to their collateral value, then all secured creditors would be freed of any  
concern that debtors could reduce the amount of their liens while retaining property.  
If Congress did not intend to allow lien stripping in general in Chapter 13 cases, then  
why would it bother to draft the exclusionary language of Section 1322. As Justice

1 Stevens' concurring opinion in Nobleman emphasized, the legislative history of  
2 Section 1322(b)(2) reflects Congressional desire to provide special protections to  
residential lenders." Denver, at 141.

3 Accordingly, the language of the relevant Bankruptcy Code sections and the decisions  
4 interpreting those sections warrants a finding that RESPONDENT's lien arising from the deed of  
5 trust may be extinguished and that its claim may be treated as general unsecured in Debtors' plan.

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VI.

CONCLUSION

Based on the foregoing, Debtors request that the Court enter an order which:

1. An Order determining that the value of that certain real property commonly known as 9803 Antelope Canyon Avenue, Las Vegas NV 89147 (hereinafter "Real Property") was \$257,000.00 as of the date of filing;
2. Determining that the secured claim of Wells Fargo Bank (hereinafter "Wells Fargo 1") with respect to the Real Property is senior to that of Wells Fargo Bank (hereinafter "Wells Fargo 2") and that the amount of Wells Fargo 1's secured claim exceeds the value of the Real Property;
3. Determining that Wells Fargo 2's claim is wholly unsecured; and
4. Finding that modification of Wells Fargo 2's claim is therefore appropriate under 11 U.S.C. §1322(b)(2), that the lien of Wells Fargo 2 is extinguished and that Wells Fargo 2 may be provided for as an unsecured claim in the Debtors' Chapter 13 plan.

DATED: December 9, 2009.

GOLDSMITH & GUYMON, P.C.

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